

EXHIBIT

A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LOCAL UNION NO. 459 OF THE)
INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, AFL-CIO,)
Plaintiff)

v.)

PENNSYLVANIA ELECTRIC COMPANY,)
A FIRST ENERGY COMPANY,)
Defendant)

CIVIL ACTION NO. 04-347 ERIE

STATUS CONFERENCE

Proceedings held before the HONORABLE
SEAN J. McLAUGHLIN, U.S. District Judge,
in Judge's Chambers, U.S. Courthouse, Erie,
Pennsylvania, on Thursday, April 28, 2005.

APPEARANCES:

MARIANNE OLIVER, Esquire, appearing on behalf of
the Plaintiff.

GARY W. SPRING, Esquire, and TIMOTHY A. HAYES,
Esquire, appearing on behalf of the Defendant.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the proceedings began at 1:30 p.m., on Thursday, April 29, 2005, in Judge's Chambers.)

THE COURT: This is the time we set for status at 04-347 Erie. I've had a chance to review the pleadings. I guess, boiled down to its essence as I understand, this is what this is about. I have before me a complaint requesting that I compel arbitration. The company has taken the position, I gather, that pursuant to, I believe it's Article VII of the collective bargaining agreement, that essentially these retirees lack standing, is really what it boils down to, they are neither members or employees, members of the collective bargaining agreement, nor employees. I guess more accurately, I should say, therefore, the local is going to bat for a group that has no standing under the collective bargaining agreement. And tell me a little bit about specifically how the benefits were changed -- are we talking about medical benefits or what?

MS. OLIVER: Your Honor, thank you for, first of all, allowing me to bring a shadow with me. But in specific response to your question, the grievance that we filed, the underlying grievance was filed on behalf of employees who were active employees when asked to sign a certain form. Our grievance was filed under the theory that that form, which

1 could alter terms and conditions for those persons, was not
2 bargained with the union. There's a clause in the contract
3 that requires that the employer keep in effect all current
4 practices and so forth. So just to clear up our position, this
5 was asked, employees were asked to sign this, which is why we
6 grieved. I don't think there's any question about the fact
7 that that form could have an effect -- an adverse effect on
8 these individuals as retirees. But they do bargain, this union
9 bargains retiree medical benefits. And, of course, as active
10 employees, those active employees give up part of their bargain
11 in order to insulate those retiree medical benefits at a
12 snapshot in time under the labor agreement.

13 THE COURT: There is, if I remember, it's Exhibit B
14 to the complaint, a rather abbreviated agreement, is there
15 anything of record here which is more expansive as to what this
16 is all about?

17 MS. OLIVER: No. Ordinarily, the union is not
18 required to give --

19 THE COURT: Bare bones.

20 MS. OLIVER: The labor agreement is attached to the
21 complaint, and the labor agreement does set forth the provision
22 that we are relying on, which is Article II, Section 3.

23 THE COURT: What does it say in pertinent part?

24 MS. OLIVER: In pertinent part under Section 3,
25 "all existing practices for the benefit and welfare of the

1 employees of the company, presently in effect and not
2 specifically covered by the terms of this agreement, shall be
3 continued," I could go on.

4 THE COURT: That's the essence of it?

5 MS. OLIVER: Yes.

6 THE COURT: What's the company's position?

7 MR. SPRING: We would like their grievance defined.
8 There's no reference in the grievance whatsoever to anything
9 about the form. It talks about the company unilaterally
10 changing medical benefits.

11 THE COURT: What are you reading?

12 MR. SPRING: Exhibit D. Quite frankly, it seems
13 like an effort to back door an issue before an arbitrator. The
14 form talks about the fact that the company has the right to
15 change certain things -- medical and so forth. Apparently,
16 that's how they want to try to get to the underlying issue.
17 I think it's quite clear, your Honor, that the case law holds
18 retirees are not represented by the union, they don't have the
19 right to grieve. And the language of the collective bargaining
20 agreement certainly supports that, too. Because it talks about
21 active bargaining unit members. Talks about employees and how
22 they must present their grievance. It doesn't give any right
23 for retirees to grieve.

24 THE COURT: Did you want to say something?

25 MS. OLIVER: Well, again, these are not retirees who

1 are asked to sign this form. This form is being asked --

2 THE COURT: Tell me again, I apologize for running
3 over the same ground, but the form, that a number of, I gather,
4 current employees were asked to sign, says what?

5 MS. OLIVER: Well, it says that, in pertinent part,
6 it says that I understand that the company reserves the right
7 to terminate or change its retiree group health and group life
8 insurance coverage at any time. So they're being asked as an
9 active to sign that form.

10 THE COURT: Have you asked on behalf of the current
11 employees who have been asked to sign that form, have you
12 grieved that or asked to grieve that on behalf of current
13 employees?

14 MS. OLIVER: Yes.

15 THE COURT: To which I presume there is no
16 objection?

17 MR. SPRING: Well, I think there's objection to, the
18 form's been utilized for a long time, I'm not even sure a
19 grievance would be timely.

20 THE COURT: That's a different issue. The question
21 is whether that would be an arbitrable matter. If strikes me
22 if your position is it is not arbitrable because the retirees
23 are neither members of the collective bargaining agreement, not
24 employees, that clearly would not be true of these active
25 employees who have been asked to sign this. My question is

1 does your grievance subsume these active employees?

2 MS. OLIVER: Our grievance was filed on behalf of
3 actives, there's no question about it.

4 THE COURT: Is there some basis for resisting
5 arbitration insofar as active employees are concerned?

6 MR. SPRING: If it were actives, it was an active
7 employee issue. It's a retiree issue. It's just sort of a
8 rouse to get there. If we had these people sign the forms the
9 day after they retired, there would be no issue. We do so as a
10 convenience for them before they retire, they sign the form.

11 MS. OLIVER: And that's the very nub of it, your
12 Honor.

13 THE COURT: I'm beginning to see it now. What
14 you're doing is you are asking present employees to sign a form
15 with respect to the treatment of benefits that they will only
16 receive when they become retirees, is that right?

17 MR. SPRING: Correct. It's a benefit election,
18 retirement election form.

19 MS. OLIVER: Our problem, though --

20 THE COURT: Let me ask one other question, then I'll
21 hear more of your problem. Let me follow-up with you. Putting
22 aside the arbitrability issue, why is it your position, I
23 gather it is under the terms of the collective bargaining
24 agreement, why does a requirement like that run afoul of your
25 collective bargaining agreement?

1 MS. OLIVER: Because our collective bargaining
2 agreement does not permit the employer to make changes in
3 employment conditions.

4 THE COURT: That would be a bargain for retirement?

5 MS. OLIVER: Correct. Our labor contract has
6 negotiated retiree medical benefits in it. And I know this is
7 probably getting too far along, but cases on ERISA retiree
8 medical, sometimes turn on intent and what was said and by
9 people at the time they retired. That's why the significance
10 of them signing this form as actives is very important.

11 THE COURT: This case isn't on all fours, probably
12 not on all threes or twos with this, this is reminding me of a
13 case I had, I know you folks do a lot of work in this area,
14 Erie County Retirees.

15 MS. OLIVER: I know the case.

16 THE COURT: It's all coming back to me now. But in
17 a slightly -- in an age context. So I guess let me ask this.
18 Even though the folks who want to grieve this are, in your
19 view, grieving something that has really not yet occurred yet
20 and will only potentially occur once they achieve retiree
21 status, nevertheless, they are at present employees. Even
22 though they are grieving a prospective event, which will only
23 occur after they cross the happy goal line into retirement
24 status, why for present purposes -- isn't the focus on the
25 status of the individual, as opposed to the timing of the

1 event?

2 MR. SPRING: Well, I guess -- when they prefer to go
3 to a grievance or arbitration, there's a case of controversy at
4 that point.

5 THE COURT: Just by way of picking your brain, I
6 have no fixed opinion on this one way or the other.
7 Presumably, the company would not have requested that the form
8 be signed unless they thought there was some reasonable
9 likelihood that at some point in the future they might tinker
10 with the benefits?

11 MR. SPRING: It's been in the summary plan
12 descriptions and documents forever. Quite frankly, this is
13 kind of a new theory that developed after they went through the
14 grievance procedure. We never heard anything about the forms.

15 THE COURT: What grievance procedure, I didn't think
16 you got off the ground?

17 MS. OLIVER: We did not get off the ground.

18 MR. SPRING: There's some minutes and things.

19 THE COURT: What did you do to initiate the
20 grievance, what do you do under the terms of the collective
21 bargaining agreement to get the grievance rolling towards
22 arbitration?

23 MS. OLIVER: A grievance was filed by the business
24 agent, her father, after it was filed at the low level steps of
25 supervision, the business manager in the union, a member with a

1 low level supervisor. Letters were sent about what the
2 grievance was about. He answered that letter. I answered a
3 letter to in-house counsel. And they wouldn't arbitrate.
4 Which I asked them to arbitrate. They wouldn't, so --

5 THE COURT: Let me ask you this. As a class of
6 individuals on behalf of whom this local is attempting to go to
7 bat at arbitration, is that class comprised at all of anyone
8 who has already retired?

9 MS. OLIVER: Probably. But when they were asked to
10 sign this form, they were all actives. How this arose was --

11 THE COURT: Let me tell you what my problem is here.
12 This is probably my problem not yours. This dispute remains
13 after 15 minutes quite ill-defined for me. I'm having a real
14 problem with this. Tell me if I got it right this time. The
15 local wants to arbitrate the grievance, which, essentially, the
16 company's right to unilaterally change certain types of
17 retirement benefits -- I gather you'll be happy if they're
18 increased or eliminate them, on behalf of both employees who
19 are presently employed but have been required to sign this
20 agreement and on behalf of those who are in fact retired but
21 would be affected by this change, is that right?

22 MS. OLIVER: Well, it's correct with regard to the
23 actives, yes, not the retirees.

24 THE COURT: I just asked a minute ago if any member
25 of the class on behalf --

1 MS. OLIVER: Has since retired since the grievance
2 arose?

3 THE COURT: Yes.

4 MS. OLIVER: I'm sorry, I guess that would be the
5 case.

6 THE COURT: Let me ask another question here. Isn't
7 this all much ado about nothing, I mean, if you really sit down
8 and think about this, now that I thought about it, as long as
9 there is one current employee, it seems to me, who objects to
10 the requirement to sign this form, then it strikes me at first
11 blush that it's arguably arbitrable because the person is an
12 active employee. So if you -- and then whatever decision would
13 be rendered there, without any retirees officially being part
14 of the grievance procedure, would necessarily impact on all
15 present employees and presumably they are de facto future
16 retirees. But you don't run the problem of mixing the two
17 together, what am I missing here?

18 MR. SPRING: I think you're right, it's more
19 arbitrable that way. But they're trying to get to the same
20 issue by using a form to get there.

21 THE COURT: It goes away, at least my problem goes
22 away. Then it becomes a substantive issue for the arbitrator.
23 It never would be a substantive issue for me, it's simply
24 arbitrability?

25 MR. SPRING: Correct.

1 THE COURT: So, for the record, then, to dispel any
2 confusion which might heretofore had existed, are you grieving
3 this only on behalf of active employees?

4 MS. OLIVER: That's correct, your Honor.

5 THE COURT: We seem to be making some good progress,
6 keep going.

7 MS. OLIVER: The employer does not have the right to
8 make unilateral changes in existing practice, in this case the
9 form.

10 THE COURT: I don't know what that means in this
11 case, existing practice in this case the form. What is
12 existing practice and what's going to be changed?

13 MS. OLIVER: That the methodology or how these
14 employees sign up for retirement did not contain a provision
15 that said they understand that their benefits can change.

16 THE COURT: In other words, are you saying up to
17 this point prior to the requirement of this form, any change of
18 benefits of the nature contemplated by that form would have
19 required that it be bargained over?

20 MS. OLIVER: Exactly.

21 THE COURT: That's your point?

22 MS. OLIVER: And the labor agreement does state --

23 THE COURT: That's their grievance. It doesn't
24 matter whether you agree with it, you know what it is?

25 MR. SPRING: Correct.

1 THE COURT: All right. Now, let's go off the record
2 for a minute.

3 (Discussion held off the record.)

4 THE COURT: Go ahead.

5 MR. HAYES: Their grievance is they object to us
6 having them sign the form and it doesn't go to the issue as to
7 whether or not the company has the right to change the medical
8 benefits of retirees. If it's limited to that company and the
9 company has been very consistent with we're willing to
10 arbitrate, but we need to know what we're going to arbitrate
11 before we get to an arbitrator. Once we submit arbitrability
12 to an arbitrator, we have given our rights to the arbitrator.
13 When in fact that is an issue as to the arbitrability of the
14 substance of it belongs in the courts.

15 THE COURT: To be clear, the issue of arbitrability
16 belongs in the courts. The issue of merits belongs before an
17 arbitrator.

18 MR. SPRING: Our point would be if the retiree wants
19 to challenge some action, that should be an action under ERISA
20 and bring it to court.

21 THE COURT: I've just been told retirees will not be
22 doing that, this will be a grievance restricted solely to
23 active employees, is that correct?

24 MS. OLIVER: Correct.

25 THE COURT: Don't look a gift horse in the mouth.

1 MR. SPRING: I'm not so sure it's a great gift.

2 MS. OLIVER: First of all, the employer was told, in
3 my letter to you, Tim, dated January 3rd, I told you exactly
4 what we were grieving. And I might add one of the union
5 officers was going to retire. I think it's screaming volumes
6 that he was not asked to sign this form. Other union people
7 were asked to sign this form. The union wasn't told about this
8 form. If you take a look at ERISA medical cases and if some
9 participants, a retiree decides to sue them under ERISA, one of
10 the things courts look at is what did people believe they had
11 at the time they retired.

12 THE COURT: Let me ask you this. If the employees
13 were not being asked to sign this form -- and yet the company
14 announced a policy that in the future it would or could or
15 might alter the benefits, you would be grieving that. This is
16 simply, so really they're one in the same. The form is
17 somewhat incidental to the major dispute, and that is the
18 company's right to unilaterally change these benefits, is that
19 right?

20 MS. OLIVER: That's right. I mean, the problem with
21 these or the contract has a finite life, I've been a union
22 lawyer for a long time and I've done these retiree medical
23 cases, their difficult cases under ERISA, there's no question
24 about it. But they do, whether people had vested benefits for
25 life and so forth, that can be a question of intent. What they

1 signed at the time before they retired can play a big part in
2 that. Well, if you negotiate as an employer their retiree
3 benefits in this contract, and then you do an end run around,
4 the union has them sign a form that says I acknowledge these
5 can be changed, that's why we grieved. You can't do that --

6 THE COURT: Without bargaining?

7 MS. OLIVER: Exactly.

8 MR. HAYES: May I add something, your Honor. Well,
9 recently, in March of 2004, the company entered into a new
10 stipulation settlement with the union. I think the language is
11 very specific as it pertains to retiree medicals. What retiree
12 medical benefits, their members are entitled to during the term
13 of this contract, okay -- when a contract expires, it's the
14 company's position so does the obligation as far as any finite
15 benefits, any finite obligation. And I think that's what at
16 issue, the union is trying to get by not the people who retire
17 under the contract. Not during the term of the contract, but
18 going passed the term of the contract.

19 MR. SPRING: They're trying to say they're vested
20 and locked down for life.

21 THE COURT: I understand what they're saying, but
22 that's a merits position as opposed to, it strikes me, as
23 opposed to an arbitrability position. I mean, put it this way.
24 Barring, with respect to any active employee who tries to
25 grieve this, barring an untimely death, they will certainty

1 become or the unfortunate closing of the plant, they will
2 certainly become a retiree some day. I guess, getting back to
3 my original point, I understand the grievance now and I
4 understand the company's position that, among other things, as
5 a matter of substance of the collective bargaining agreement,
6 their position is incorrect. But that having been said and
7 coupled with the fact that you have disavowed any intent to
8 bring any retirees on board, why isn't this arbitrable?

9 MR. SPRING: Because I think they're trying to play
10 a game or end run to get to the issue of does the company have
11 a right to change for the retirees. I mean, they may say it's
12 because of the form, because of actives, something had to
13 happen to them in the future, really they want to get to the
14 issue for the retirees. There is still reluctance on our part
15 to say oh, great, they're just grieving on behalf of active
16 employees. But there's nothing happening to the active
17 employees.

18 THE COURT: I guess the narrow legal issue is
19 whether or not your status as an active employee should be
20 viewed differently where the consequences of what the company
21 is going to do will only materialize at the time when you have
22 become a retiree.

23 MR. SPRING: And it may never materialize.

24 THE COURT: Let's talk a little bit about bringing
25 this thing into some focus. For the life of me, I'm willing to

1 be disabused of this, I cannot see why anybody needs any
2 discovery on this at all?

3 MR. SPRING: The only discovery we wanted was to try
4 to find a grievance.

5 MS. OLIVER: Your Honor, our collective bargaining
6 agreement does not require we give a detailed version.

7 THE COURT: You just did.

8 MS. OLIVER: I had to get to the point to move this
9 forward. The labor agreement doesn't require that. The labor
10 agreement requires we cite the chapter and verse -- that's been
11 violated.

12 THE COURT: I'm looking at Article VII.

13 MR. SPRING: Page 36.

14 THE COURT: Section 1. "Any complaint, grievance,
15 or dispute that may arise with respect to the application or
16 performance of this agreement between the company and the union
17 or its members shall be taken up for settlement in the simplest
18 and most direct manner. A grievance is hereby defined as any
19 violation of the terms of this agreement," etc. If present
20 members of the union are concerned about this form which
21 they're being required to sign, I understand full well the
22 company's substantive position on this, it would ultimately be
23 a loser at arbitration, under the clear language of that
24 section, this is arbitrable, because they are members of the
25 collective bargaining agreement.

1 MR. SPRING: If it's a current member objecting to
2 the form, I agree with you.

3 THE COURT: That's it as far as I'm concerned.
4 You're bound by what you just told me, that is the scope of the
5 class. And it cannot include today, nor can it include
6 tomorrow, anyone other than an active, anyone other than a
7 member of the collective bargaining agreement, which by
8 definition means an employee. Now, that having been said, do
9 we still have a dispute?

10 MS. OLIVER: I don't think we do. If they stopped
11 being active and the actives signed this form today, and
12 disavowed any other active that they may sign it, I wouldn't be
13 here. I would not be here. I wouldn't even need to arbitrate.

14 THE COURT: They're not going to do that. I'm just
15 saying, is there any longer -- I just heard the company say, I
16 don't want to put words in your mouth, but as defined, you
17 agree that it's arbitrable, as we have sharpened the group?

18 MR. HAYES: As it pertains to active employees
19 during the term of this agreement. It doesn't exceed the term
20 of this agreement.

21 MS. OLIVER: A person who's an active who signs a
22 form like that -- if they want to file an ERISA complaint, that
23 the employer has cut their medical, what they file as an active
24 could have an effect on that suit.

25 THE COURT: But, once again, we're wandering beyond

1 my very limited area of arbitrability. That is a remedy issue,
2 that's an effects issue for the arbitrator, that isn't for the
3 court.

4 MR. HAYES: I think the arbitrator has authority to
5 issue a ruling going beyond the term of the agreement. That is
6 the union's end gain.

7 THE COURT: Neither do I right now, I don't have
8 that issue before me.

9 MR. SPRING: Can we have that on the record, we want
10 to make sure we're not waiving anything -- if the arbitrator
11 would exceed his or her authority.

12 THE COURT: Then this case, it's shortly going to be
13 on the record resolved, it is explicitly understood that you
14 are not waiving any defenses that you might have. To make it
15 crystal clear, as I understand it, in acceding to the
16 arbitrability of this dispute as it has been most recently
17 defined on the record, you want it to be crystal clear that you
18 are not waiving any procedural or substantive defenses that you
19 might have now or later with respect to the arbitration?

20 MR. SPRING: That's correct.

21 THE COURT: Then that's on the record, you are
22 protected on that, you have it. Unless I hear any objection,
23 I'm going to indicate on the record for the reasons we just
24 previously talked about, that the parties have resolved this
25 matter. I'm going to do it right now. For the reasons we just

1 discussed on the record, with the benefit of the grievance
2 being more carefully defined, as well as the class of
3 individuals who would comprise the group on whose behalf the
4 union was arbitrating, that being restricted only to active
5 employees, the company now agrees that that dispute as
6 redefined or more sharply defined is arbitrable. Since the
7 dispute before me was arbitrability, that issue has now been
8 resolved. So in my view this case has been resolved. The only
9 thing I'm going to ask you to do is file a Rule 41 dismissal of
10 this action. Once again, for the record, in resolving the
11 dispute, all defenses, substantive or otherwise, that the
12 defendant might have and raise at arbitration are preserved.
13 All right, thank you, counsel.

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15 (Whereupon, at 2:00 p.m., the proceedings were
16 concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.


Ronald J. Bench